Chahal (Migration) [2023] AATA 4348 (19 December 2023)

1.

2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Manjit Singh Chahal
REPRESENTATIVE:	Mr Harpal Singh Bajwa (MARN: 0955800)
CASE NUMBER:	2302316
HOME AFFAIRS REFERENCE(S):	BCC2020/2068278
MEMBER:	Warren Stooke AM
DATE:	19 December 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

-
- Statement made on 19 December 2023 at 5:18pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – education certificate – cited education authority does not exist – compelling circumstances – current enrolment – Notice of Intended Marriage – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5(1), 65, 359, 375
Migration Regulations 1994, Schedule 2 cl 500.212; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 31 January 2023 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).

4. The applicant applied for the visa on 11 August 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl PIC4020 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the applicant had did not meet PIC4020 relating to the authenticity of evidence to support prior secondary education in India with documentation submitted from the Delhi Board of Senior Secondary Education.

5. The applicant appeared before the Tribunal on 18 December 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.

6. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.

7. On 1 September 2023, the Tribunal provided the applicant with a s375A Certificate issued by the Department and an overview of matters relating to the Certificate, with an invitation to comment on the Certificate by 22 September 2023.

8. The applicant responded to the Tribunal correspondence of 1 September 2023 on 22 September 2023 with the advice that the applicant will address the matters at hearing.

9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl PIC4020 for the grant of the visa.

11. The Tribunal explained to the applicant, that broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10

years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

13. The Tribunal explained to the applicant the substance of the s375A Certificate placed on the applicant's Department file.

14. On 1 September 2023, the Tribunal provided the applicant with a s375A Certificate issued by the Department and an overview of matters relating to the Certificate, with an invitation to comment on the Certificate by 22 September 2023, as follows:

> "Dear Mr Chahal
> **NOTIFICATION REGARDING DISCLOSURE OF CERTAIN INFORAMTION TO THE ADMINSTRATIVE APPEALS TRIBUNAL UNDER SECTION 375A OF THE MIGRATION ACT 1958 – MR MANJIT SINGH CHAHAL**
> I am writing in relation to the application for review made by you in respect of a decision to refuse to grant a Student (Temporary) (Class TU) visa.
> I am writing in relation to the application for review made by you in respect of a decision of 31 January 2023 concerning the **Notification of refusal of application**
> **for a Student (Temporary) (class TU) Student (subclass 500) visa**.
> Your application has been constituted to Member Warren Stooke AM to conduct the
> Tribunal's review of the decision relating to your Student (Temporary) (class TU) Student (subclass 500) visa.
> The Presiding member has instructed me that he would like to comments prior to the
> hearing that is schedule to consider your case.
> The Tribunal has formed a preliminary view that the information covered by the s.375A Certificate is such that, were it to be accepted, it would afford at least a part of the reason for affirming the decision under review (per s.359A(1)(a)); such that in the specific circumstances arising in this case the Tribunal has considered there is a need to disclose particulars of the s.375A certificate material, and that the best way within which to do that has been by means of affording the Applicant with broad particulars of the s.375A certificate information provided herein.
> A copy of the Departmental s.375A Certificate is attached for your information. The
> particulars in your case relate to the following Departmental allegation:
>
> - As part of the applicant's previous TU 500 visa (RID 1350601778) application he submitted as proof of education certificate issued by the Delhi Board of

Senior Secondary Education (CLD2017/27487479). The Department has been advised that this body is fake and not recognised by the Directorate of
Education, which has been verified by the Department with the Directorate of
Education and other sources that cannot be disclosed by the Tribunal.

- As such, there is a potential that you have provided the Department with a
bogus document and/or false or misleading information, which constitutes
grounds for PIC4020 being available.

- The Tribunal is advised that you are alleged to have declared the Delhi Board
of Senior Secondary Education, as part of your educational qualifications. You are invited to make a written submission to the Tribunal about the s 375A
certificate, which should be provided to the Tribunal by the close of business on 22 September 2023

If you have any questions, please email mrdivision@aat.gov.au, or contact me on the
number listed below, or telephone our national enquiry line on 1800 228 333. For
language assistance, please contact the Translating and Interpreting Service (TIS) on 131 450."

15. On 22 September 2023 the applicant provided the Tribunal with the advice that the applicant will address the matters at hearing, with the following comment:

> "Honourable member, I understand that i have been asked to comment upon: A copy of the Departmental s.375A Certificate is attached for your information.The particulars in your case relate to the following Departmental allegation: As part of the applicant's previous TU 500 visa (RID 1350601778) application , the submitted as proof of education certificate issued by the Delhi Board of Senior Secondary Education (CLD2017/27487479). The Department has been advised that this body is fake and not recognised by the Directorate of Education, which has been verified by the Department with the Directorate of Education and other sources that cannot be disclosed by the Tribunal' I understand that the sources cannot be disclosed but i would like to be given a chance to participate in the hearing and comment upon it whoch was not considered by the decisionmaker. Regards Manjeet singh chahal"

16. The applicant asserted that he had completed the studies with the Delhi Board of Senior Secondary Education and stated that he could no longer access material on their website. He also stated that his cousin, in India, tried to obtain information without success.

17. The applicant stated that he tried to contact the College and to ask the College but the school was closed.

18. The Tribunal asked the applicant if he was aware that the Delhi Board of Senior Secondary Education does nor exist and the applicant responded that it is similar to the Punjab Education Board.

19. On 14 December 2023 the applicant submitted, prior to hearing, that his results were inaccessible due to a 'technical glitch', which he reconfirmed at hearing.

20. The Tribunal then advised the applicant that the Tribunal was satisfied that the document from the Delhi Board of Senior Secondary Education is not valid and that the Tribunal would advise the criteria applying to the Tribunal's exercise of a waiver following the confirmation of some preliminary information pertaining to the applicant.

21. The Tribunal confirmed with the applicant that he was granted a Bridging Visa A on 11 August 2020 with a 8105 'work limitation' that became active on 14 August 2020.

22. The Tribunal confirmed that the applicant had an accountant balance with Westpac on 5 August 2020 of $17,860.73.

23. The Tribunal asked the applicant if he maintained health insurance, which was valid from 14 August 2020 to 18 November 2022 and whether it had lapsed. The applicant claimed that he maintained health insurance.

24. The Tribunal confirmed that the applicant completed a Certificate IV in Business at St Adam College on 8 October 2018.

25. The applicant provided evidence that he held a confirmation of enrolment for a Diploma of Leadership and Management at Gen Institute Pty Ltd, which was proposed to be completed from 17 January 2022 to 14 January 2023, which the applicant stated he has not completed.

26. The applicant stated that he had also enrolled in a Diploma of Marketing and Communication from 7 January 2019 to 5 July 2020, which he stated he had not completed.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

27. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

28. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

29. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

30. On the basis of the Departmental investigation regarding the status of the Delhi Board of Secondary Education and the applicant's response to the Tribunal correspondence of 1 September 2023 on 22 September 2023 and at hearing, the Tribunal is satisfied that the Departmental s375A Certificate is valid. In this regard, the Department has confirmed with Indian authorities that the Delhi Board of Secondar Education does not exist and thereby the accreditation provided to the applicant has no legitimate status.

31. Further, the Tribunal is satisfied on the basis of the evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a 'bogus document', as defined in s 5(1), i.e. a document that the Tribunal reasonably suspects is a document that purports to have been, but was not, issued in respect of the person by a legitimate education authority. As such, the Tribunal is satisfied that 'information that is false or misleading in a material particular' as defined in PIC 4020(5) has been given to the Department, i.e. information that is false or misleading at the time it is given, and relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

32. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

33. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

34. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

35. The Tribunal explained the criteria relating to the exercise of a waiver and invited the applicant to provided evidence for the Tribunal to consider in exercising the potential for a waiver.

36. The Tribunal asked the applicant whether he had any compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, which may inform the Tribunal in the consideration of the applicant's case, justifying the grant of a visa?

37. The applicant responded that he is engaged in one week and that he intends to marry his wife in January 2024, who has permanent residency and that he had already qualified in Business.

38. The Tribunal asked the applicant why should the Tribunal exercise a waiver and he responded: "My genuine interest is to live in Australia and I want to start my own business in Australia".

39. The Tribunal then noted that the applicant's application of 11 August 2020 provided a Bridging A Visa that permitted the applicant to work and study and that he had not completed any course of study since October 2018.

40. The applicant claimed that he was not aware he could study following advice from his previous agent and was not aware of that condition.

41. The Tribunal noted that the applicant does not have a current Confirmation of Enrolment and has provided no documentary evidence at the time of hearing regarding a 'relationship certificate' or documentary evidence of an impending marriage.

42. The tribunal asked the applicant if he wanted to make any further comment and the applicant asked the Tribunal to support the grant of the visa as it would be hard for his new wife and himself.

43. **Representative Submission**

44. The Representative submitted that he was not always the agent of the applicant and maybe the previous agent did not properly explain the terms of the applicant's visa.

45. The Representative stated that if they can't stay together, a relationship issue will start.

46. The Representative submitted that the Board does actually exist and that there are many states in India that are not all controlled by the central government and that it is not possible to get information from 15-16 years ago.

47. The Tribunal was asked by the Representative if he could be given time to obtain further documentary evidence and the Tribunal responded that given that the applicant was advised on 31 January 2023 of the PIC 4020 decision by the Department, the applicant has had ample time to prepare for the hearing and submit documentation, however, it was available to the applicant to submit material up to the time of decision.

48. The Tribunal noted that whilst the matter before the Tribunal is in relation to PIC4020, matters pertaining to the 'genuine temporary entrant criteria' do potentially arise given the absence of participation in study, which is not within the consideration of the current review.

49. Further, the applicant has stated that he is seeking to remain in Australia as a student, but did not have a Confirmation of Enrolment, at the time of hearing, and has given evidence that it is his intention to live in Australia and set up a business, which is not consistent with the criteria pertaining to the original visa application pursuant to cl. 500.212. The Tribunal acknowledges that in this case the consideration is not in relation to cl 500.212 and is not the subject of consideration in this matter.

50. The Tribunal advised the applicant that documentation can be submitted up until the time of decision.

51. Following the hearing the applicant submitted a weddings invitation card with a proposed wedding date of 3 February 2024 at High Street, Epping and a Notice of Intended Marriage dated 18 December 2023 between the applicant (Logistics driver) and Ms Kaur (Nurse).

52. The applicant provided the Tribunal with a Confirmation of Enrolment to undertake an Advanced Diploma of Information Technology at Imperial College from 22 January 2024 to 18 January 2026.

53. The applicant provided evidence that his partner, Ms Gagandeep Kaur, was granted a 186 Employer Sponsored Visa on 9 March 2021, together with a declaration dated 18 December 2023, relating to their family arranged marriage, the applicant's claimed expertise in logistics and their intention to establish their business.

54. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

55. The Tribunal is satisfied that the applicant has maintained that the education accreditation from the Delhi Board of Secondary Education is legitimate despite Departmental evidence to the contrary.

56. Further, the Tribunal is satisfied that whilst the applicant has provided evidence concerning an impending marriage to a person whom was granted Permanent Residency on 9 March 2021, the applicant has also provided a Notice of Intended Marriage, which was created immediately following the hearing on 18 December 2023 to address the shortfall of information identified by the Tribunal, at hearing.

57. In addition, the applicant has produced a COE that was acquired immediately after the hearing on 18 December 2023 for a course of study that has not been previously contemplated by the applicant or explained, as to how the proposed course will benefit the applicant's future.

58. In essence, the Tribunal is not satisfied that the Tribunal should exercise a waiver in this case, as the applicant has demonstrated non-compliance with his previous visa obligations and belatedly seeks to remedy shortfalls in his own behaviour. The Tribunal considers that with family based in India, it is available to the parties to return to their home country where they have extended family support, particularly given that the applicant was seeking a Student (Temporary) visa prior to the PIC4020 decision on 23 January 2023.

59. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl PIC4020.

DECISION

60. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Warren Stooke AM
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…